SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 416

STATE NATIONAL BANK OF MAYSVILLE, KENTUCKY,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

HENRY E. MCELVAIN, JR.,
RICHARD PRIEST DIETZMAN,
Counsel for Petitioner.

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PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF THE COURT OF APPEALS OF KENTUCKY.

MAY IT PLEASE THE COURT:

Your petitioner respectfully petitions for a writ of certiorari, to be issued by this Court to review the decision of the Court of Appeals of Kentucky, a State court of last resort, in the above styled cause (R. 45).

I. Short Statement of the Matter Involved.

The facts are not in dispute, being stipulated by the parties (R. 15). The Star Produce Company, located at Maysville, Kentucky, had for a long time prior to July 6, 1935,

been a shipper of poultry in car load lots over the line of the respondent herein. These shipments were ordinarily carried by an east bound freight train, leaving Maysville at 3 o'clock in the morning. The freight depot of the railroad company closed at 4:30 P. M., but the custom had long existed for the railroad company to spot empty cars on the produce company's spur track for the purpose of being loaded with poultry, and to issue bills of lading on such cars, the loading of which had either started, or which was started later, with the understanding between the railroad and the Star Produce Company that the cars would thereafter be loaded by the Produce Company, and placed in the aforesaid east bound train. When these bills of lading were issued, the railroad company knew that the loading of the cars had either not been started, or not been completed. The railroad company's agent made no examination of any of the cars spotted, or of their contents, before issuing the bills of lading.

On July 6, 1935, and July 11, 1935, pursuant to the aforesaid custom, the railroad company spotted two cars on the Produce Company's spur track, and not knowing whether the car was loaded in whole or in part, issued a uniform straight bill of lading to the Produce Company for a car of live poultry of the weight of 14,000 pounds, with the notation "shipper's load and count" on the bill. As a matter of fact, on the July 6th car, only 3,000 pounds of poultry were ever loaded, and on the July 11th car, no poultry was loaded. The cars were consigned to Julius Kastein of New York. The Produce Company drew a draft upon the consignee for the sum of $1,800.00 on each of the cars. The $1,800 represented the value of the cargo of live poultry had the 14,000 pounds been loaded. The drafts with the bills of lading attached were discounted with the petitioner, the State National Bank of Maysville, Kentucky. Of course the con-

signee refused to pay the drafts since one car contained only 3,000 pounds of poultry and the other car was empty, having never been loaded.

At the time of the dishonor of the drafts, the Produce Company had on deposit with the petitioner herein $1,240.62, which was credited against the $3,600.00 advanced on the two drafts, leaving a balance of $2,359.38 for which your petitioner sued the respondent. At the time the petitioner discounted the drafts, it had no knowledge that the loading of the cars was otherwise than as set out in the bill of lading. The loading of the cars was not completed because the Produce Company became insolvent, and was unable to comply with its agreement to load or complete the loading. Petitioner sued the respondent, as petitioner contends, on an action for deceit or negligent use of language, in that the carrier, by the bills of lading which it had issued, represented that the two cars in question had been loaded with poultry, whereas, and in fact, they had not been loaded, and the carrier knew at the time of the issuance of the bill of lading, such fact, and knowing that the bills of lading could be used, as they were. for the purpose of securing credit.

The defense of the carrier was that the case was governed not by the principles of the common law action of deceit, but by the Federal Bill of Lading Act, U. S. C. A. Title 49, Sections 81, *et seq.* (R. 9-14, 25). The trial court rejected the contention of the respondent, and rendered judgment in favor of the petitioner (R. 20). On appeal to the Court of Appeals by the respondent, the judgment of the lower court was reversed, and the theory of the respondent upheld (R. 26-35). Upon return of the case to the lower court, judgment pursuant to the opinion of the Court of Appeals of Kentucky on the first appeal was entered in behalf of the respondent (R. 43). Thereupon the petitioner appealed to the Court of Appeals where, under the principle of the law of the case which prevails in Kentucky, the judgment of the

lower court was affirmed, and it is from that judgment (R. 45-46) this petition for a writ of certiorari is taken.

II. The Basis Upon Which it is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

It is contended that this Court has jurisdiction to review the judgment or decree in question because the Court of Appeals has expressly denied relief to your petitioner on the ground that this case is governed not by the common law principles of deceit and negligent use of language, but by the Federal Bill of Lading Act, U. S. C. A. Title 49, Sections 81 to 124, and that the bills of lading involved being straight bills of lading, and not order bills, the case is governed by the aforesaid Federal Bill of Lading Act, and expressly of Title 49, U. S. C. A. Sections 82, 83, 109, 112, and especially 102. It is the contention of the petitioner that by the invocation of the Federal Bill of Lading Act, and the decision of the Court of Appeals as to its applicability, its rights at common law have been denied and it is its contention that the aforesaid Federal Bill of Lading Act has no applicability to the case presented. It is the contention of the petitioner that the decision of the Court of Appeals of Kentucky is in square conflict with the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Chicago and Northwestern Railroad Company* v. *Stevens National Bank of Fremont,* 75 F. (2d) 398, which case parallels with startling fidelity the facts of the instant case. In that case a produce company was carrying on a butter and egg business at Fremont, Nebraska. The produce company had a private warehouse with a spur track running beside it. The railroad company furnished cars on the order of the shipper and spotted them for loading on the track of the warehouse. The shipper did the loading, made out bills of lading on forms furnished by

the carrier, and presented them to the carrier's agent for signature. The carrier's agent signed many of these bills of lading which bore the notation "shipper's load and count" prior to the loading of the cars by the shipper. One of these bills of lading was signed by the carrier's agent covering 400 cases of eggs to be transported to New York, whereas and in truth no eggs had ever been loaded on the cars, and the cars were never loaded, nor sealed. The bill of lading so issued was discounted by the produce company with the Stevens National Bank of Fremont. The shipper became bankrupt, and the bank lost the proceeds of the discount of the produce company's note. The Circuit Court of Appeals upheld recovery on behalf of the bank and discussed in full the applicability of the Federal Bill of Lading Act, and also the notation on the bills of lading "shipper's load and count". The meat of the court's decision is thus set out in the opinion:

> "The weakness of the carrier's position here, it seems to us, lies in the fact that it issues the bills at a time when the cars were not loaded; when they were not sealed, when the freight was not paid, and when it had received neither the cars, nor any order from the shipper to move them. In fact the bills were issued at a time when all that the carrier had done was to place the cars for loading. There was nothing actually fraudulent in the issuance of these bills by the carrier, and it was following a custom with respect to this shipper which over a period of eleven years had caused no loss to anyone. The shipper, however, had no right to receive the bills at the time they were issued, and the carrier, by issuing the bills at the time it did, enabled the shipper to defraud the bank. The representations in the bills as to the content of the cars, by virtue of the notation 'shipper's load and count' were the representations of the shipper. The other representations, however, as to seals, as to pre-payment of the fare, and as to the receipt of the cars for transportation were those of the carrier, and they were not true

> when made, nor did they ever become true. It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enables such third person to commit the fraud * * * Therefore, if we are correct in our position that these bills were issued at a time and under circumstances when they should not have been issued, and that they contained representations by the carrier, which were false, it would follow that the conclusion reached by the Court below that as between the bank and the carrier, the carrier must bear the loss occasioned by the shipper's fraud, was justified. The judgment is affirmed."

The Court of Appeals of Kentucky, while agreeing with the result reached, disagreed as to the basis on which the judgment of the United States Circuit Court of Appeals was based, and declined to follow that case. It is also respectfully submitted that the decision of the Court of Appeals is in conflict with the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Boatmen's National Bank of St. Louis* v. *St. Louis, Southwestern R. R. Co.*, 75 F. (2d) 494, wherein the court rested its decision on points exactly similar to the case at bar on the *Chicago and Northwestern Railroad Company* v. *Stevens National Bank of Fremont* case, *supra*.

Conclusion.

For the reasons hereinbefore set out, it is respectfully submitted that the petition for a writ of certiorari to review the decision of the Court of Appeals of Kentucky in the above styled cause should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

(9717)

Supreme Court of the United States

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Reference to the reports wherein may be found the opinions of the Court of Appeals of Kentucky in this case having been omitted from the petition for certiorari, we take the liberty of supplying such omission. The opinion on the first appeal is reported in *280 Ky. 444, 133 S. W. (2) 511;* the opinion on the second appeal may be found in the Advance Sheets of *141 S. W. (2) 869.*

The opinion on the first appeal contains a full statement of the facts of the case. To avoid confusion, attention is called to what purports to be the opinion on the first appeal on pp. 27-35, Transcript; the opinion as so copied in the transcript of record was actually delivered by the Court of Appeals on June 23, 1939, but in response to the appellee's petition for rehearing (pp. 35-41, Transcript), such opinion was modified and extended on its face, as shown by order of the Court on November 17, 1939 (p. 41,

Transcript). The opinion as so modified and extended does not appear in the transcript of record in this Court, but such opinion in its final form will be found in *280 Ky. 444, 133 S. W. (2) 511.*

I

The Judgment of the Kentucky Court of Appeals On The Second Appeal Is Not Reviewable Herein.

As stated, there have been two appeals herein to the Kentucky Court of Appeals. On the first appeal *(280 Ky. 444, 133 S. W. (2) 511)*, the entire case was disposed of on its merits, and the cause remanded to the Circuit Court of Mason County, Kentucky, "with directions to enter a judgment dismissing the petition." The mandate or judgment of the appellate court on this appeal is to be found on pp. 42, 43, Transcript. Pursuant to the judgment of the Court of Appeals, the Circuit Court thereafter, without further proceedings, entered judgment of dismissal (p. 43 Transcript). A second appeal was prayed to the Court of Appeals from this judgment, which was affirmed by the appellate court on June 11, 1940 (Advance Sheets of *141 S. W. (2) 869)*, upon the ground that the opinion on the first appeal was "the law of the case." The petition for certiorari seeks a review of the judgment of the Court of Appeals on the second appeal.

It is submitted that there was nothing determined on the second appeal which is reviewable in this Court. It is obvious that the case was completely disposed of by the opinion on the first appeal, and that the judgment then rendered by the appellate court was final within the meaning of Sec. 237, Judicial Code *(28 U. S. C. A., Sec. 344)*. It disposed of the entire case on its merits, specifically directed the lower court to enter judgment of dismissal, and left nothing to the discretion of the trial court. The affirmance of such judgment on the second appeal was

solely upon the ground that the opinion on the first appeal was the law of the case. If petitioner desired a review of the cause in this Court, certiorari should have been sought following the determination of the first appeal. It is now too late to review the judgment on that appeal by certiorari proceedings directed to the judgment on the second appeal, which latter judgment determined nothing reviewable in this Court.

Rio Grande Western Railway Co. v. Stringham 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5.
Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. Ed. 822.
Mower v. Fletcher, 114 U. S. 127, 29 L. Ed. 117, 55 S. Ct. 799.
Ches. & Pot. Tel. Co. v. Manning, 186 U. S. 238, 46 L. Ed. 1144, 22 S. Ct. 881.
Northern Pac. R. Co. v. Ellis, 144 U. S. 458, 36 L. Ed. 504, 12 S. Ct. 724.
Gulf Ref. Co. v. U. S., 269 U. S. 125, 70 L. Ed. 195, 46 S. Ct. 52.
Clark v. Willard, 292 U. S. 112, 78 L. Ed. 1160, 54 S. Ct. 615.
First Bank Stock Corp. v. Minnesota, 300 U. S. 635, 81 L. Ed. 853.

(The latter case presenting a situation identical with the instant case).

II

The Petitioner's Criticisms of the Decision of the Court of Appeals Herein Are Without Merit.

(*A*) As stated in the opinion of the Court of Appeals on the first appeal, it was conceded by the petitioner that in view of the provisions of the Federal Bills of Lading Act *(49 U. S. C. A., Secs. 81, et seq.)*, no recovery could be had by it under that Act. Such concession was inescapable in view of the unambiguous nature of the provisions of

Secs. 29 and *32* of the Act *(49 U. S. C. A., Secs. 109, 112)*. The conclusion of the Kentucky Court as to the non-liability of the respondent under the Act, independent of the concession to that effect, is supported by the following decisions.

Quality Shingle Co. v. Old Oregon Lbr. & Shingle Co., (Wash.) 187 Pac. 705.
Gitchell v. Nor. Pac. Ry. Co. (Wash.) 187 Pac. 707.
Kasden v. New York, etc. R. Co. (Conn.) 133 Atl. 573.
Hinrichs v. Standard Trust & Savings Bank (C.C.A. 2), 279 Fed. 383. (Cert. Den. *258 U. S. 629)*
Weyerhauser Lbr. Co. v. First Nat. Bk. (Ore.) 38 Pac. (2d) 48, 43 Pac. (2nd) 1078.
Dir. Gen. v. Chandler (Va.) 106 S. E. 226.
Mo. Pac. R. Co. v. Askew (Mo.) 256 S. W. 566.
Knapp v. Minneapolis, etc. R. Co. (N.D.) 159 N.W. 81.

(*B*) As to bills of lading for interstate transportation, the Federal Act is controlling as to the duties and liabilities of the parties thereto, and the conduct of business thereunder:

See *49 U. S. C. A. Sec. 81*, and notes thereto, and in particular,

Ches. & Ohio v. Martin, 283 U. S. 209, 75 L. Ed. 983, 51 S. Ct. 453.
Atchison, etc. Ry. Co. v. Harold, 241 U. S. 371, 60 L. Ed. 1050, 36 S. Ct. 665.
Browne v. Union Pac. R. Co. (Kan.) 216 Pac. 299, (Affd. *267 U. S. 255).*

(*C*) The controlling effect of the Federal Act can not be avoided by the petitioner's attempted characterization of the suit as one based, not on the bills of lading, but on the reckless or negligent use of language; or, to express the same thought in the language of the Kentucky court, "a litigant may not by an attempted characterization of the nature and form of his action, control the application of legal principles":

Georgia F. & A. R. Co. v. Blish Milling Co. 241 U. S. 190, 60 L. Ed. 948, 36 S. Ct. 541.
Southern Ry. Co. v. Prescott, 240 U. S. 632, 60 L. Ed. 836, 36 S. Ct. 469.
Southeastern Ex. Co. v. Pastime Amusement Co. 299 U. S. 28, 81 L. Ed. 20, 57 S. Ct. 73.
Moore v. Duncan (C.C.A.) 237 Fed. 780.
Springfield Light, etc. Co. v. Norfolk & W. R. Co. (D. C. Ohio) 260 Fed. 254.
M. & T. Trust Co. v. Export S. S. Corp. (N.Y.) 262 N. Y. 92, 186 N. E. 214.
Corrello v. Railway Ex. Agency (Ohio) 3 N. E. (2d) 659.

(*D*) There is no conflict between the decision of the Kentucky Court of Appeals herein and the decisions of the United States Circuit Court of Appeals for the Eighth Circuit in *Chicago & N. W. R. Co. v. Stevens National Bank of Fremont, 75 Fed. (2) 398*, and *Boatmen's National Bank of St. Louis v. St. Louis, Southwestern R. Co. 75 Fed. (2) 494*. Both cases cited involved "order" bills of lading, whereas "straight" bills are the foundation of this action; this distinction is clearly pointed out by the Kentucky court and it was expressly stated in the opinion that,—"We are in accord with the conclusion reached in that case (the Stevens case), but are of the opinion that it is applicable only to order bills." The criticism of some of the language and reasoning in the opinion in the Stevens case, does not create a conflict between that decision and the decision herein. But even if such conflict be assumed to exist, that, of itself, does not authorize the granting of certiorari under either *Sec. 237, Judicial Code (28 U. S. C. A., Sec. 344)*, or *Rule 38, Supreme Court Rules.*

It is respectfully submitted that the petition for writ of certiorari herein should be denied.

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